

1 **JEFFERY D. TROWBRIDGE, Bar No. 100390**

Attorney at Law

2 180 Grand Avenue

Suite 1550

3 Oakland, California 94612

4 Telephone: (510) 893-5300

5 Facsimile: (510) 832-7228

Attorney for Moving Party and Secured Creditor,

6 CMR COMMERCIAL MORTGAGE FUND, LLC

7
8 UNITED STATES BANKRUPTCY COURT

9 NORTHERN DISTRICT OF CALIFORNIA

10 In re:

Case No. 09-48542 EDJ 11

11 DONNA FLAVETTA,

12 Debtor.

OBJECTION TO CONFIRMATION
OF PLAN OF REORGANIZATION BY
CMR COMMERCIAL MORTGAGE FUND,
LLC, HOLDER OF FIRST DEED OF TRUST
ON 463 KILKARE ROAD, SUNOL, CA)

14 Date: June 24, 2010

15 Time: 2:30 p.m.

16 Courtroom: 215
1300 Clay Street
Oakland, CA

Judge: Hon. Edward D. Jellen

17 _____ /
18 **OBJECTION TO CONFIRMATION OF PLAN OF REORGANIZATION**

19 CMR Commercial Mortgage Fund, LLC ("CMR"), holder of the first deed of trust
20 against the real property at 463 Kilcare Road, Sunol, California (the "Property") (securing a
21 loan with a current balance of approximately \$3,291,604.43), objects to the Debtor's Plan of
22 Reorganization filed on April 23, 2010 (the "Plan"), as follows:

23 **I. INTRODUCTION.**

24 In a nutshell, the Plan operates as follows: CMR's Cash Collateral will be the sole
25 source of financing to pay (1) the Debtor's other secured creditors on the Property, (2) the
26 Debtor's priority and general unsecured creditors, and (3) the Debtor. In return for being
27 compelled to fund a "visionary" and dubious plan to save Debtor's stake in the Property, CMR
28 (whose loan matured on October 1, 2009) will be locked into a new five year loan at a

1 drastically reduced interest rate without concrete (or any) evidence that Debtor can generate a
2 sufficient cash flow to fund and maintain both her operations and obligations under the plan.
3 As Debtor's attorney stated at the recent preliminary hearing on CMR's motion for relief from
4 stay, Debtor's plan is merely a visionary scheme whereby she hopes that, if she can postpone
5 repayment to CMR for such five year period, the Property will appreciate to such a value that
6 she might actually then have an equity interest in the Property. As discussed below, such
7 appreciation would have to close a current gap of a difference between a \$2,500,000 value and
8 \$4,000,000 in encumbrances. Debtor can offer no evidence that such gap will close (and, in the
9 current economic climate, it is far more likely to increase). CMR is not required to fund
10 Debtor's visionary scheme with its Cash Collateral. It would be unfair and inequitable to force
11 CMR to accept below market returns and to postpone repayment to its investor (CALPERS) for
12 the sole purpose of allowing Debtor to gamble that the real estate market will dramatically
13 increase over the next five years.

14 **II. OBJECTION TO CONFIRMATION OF THE PLAN.**

15 **A. The Plan is Not Feasible [11 U.S.C. Section 1129(a)(11)].**

16 A plan fails to meet the "feasibility" test under 11 U.S.C. Section 1129(a)(11), if
17 confirmation of the plan is likely to be followed by liquidation or a need for additional financial
18 reorganization. A plan proponent must present "concrete evidence of a sufficient cash flow to
19 fund and maintain both its operations and obligations under the plan Such a requirement
20 prevents the confirmation of visionary schemes" (Coones vs. Mutual Life Ins. Co. of New
21 York, 168 B.R. 247, 255-256 (D. Wyo. 1994); In re D&G Investments of West Florida, Inc.,
22 342 B.R. 882 (Bankr. M.D. Fla. 2006); In re Rack Engineering Co., 200 B.R. 302 (Bankr. W.D.
23 Pa. 1996).

24 In the instant case, Debtor is in default on the obligation owed to Secured Creditor
25 dating back to December, 2008. The obligation has fully matured and was due and payable as
26 of October 1, 2009. Despite similar "visionary" claims during the Spring, Summer and Fall of
27 2009, Debtor was unable to generate sufficient operating income from the Property to pay a
28 single penny of the \$27,000.00 monthly loan payments accruing to CMR during such period of

1 time. During such period of time, she also was unable to make any payments on the obligations
2 secured by 2nd and 3rd deeds of trust and accumulated other unsecured obligations.

3 According to Debtor's Operating Reports filed for the first four months of her
4 bankruptcy proceeding (September to December, 2009), she had total receipts over such four
5 month period of \$22,157.00, and net receipts of \$11,266.00 (i.e., about \$2,816.50 per month).
6 During such period of time, she continued to make no payments whatsoever on any of the
7 secured obligations against the Property.

8 Debtor's Operating Reports for 2010 show a fair amount of creativity in accounting. In
9 January, 2010, she reported "payments from Ellston of \$10,000" and a net increase in cash of
10 \$6,383. In February, 2010, she reported total receipts of \$20,000 and net receipts of \$13,641.
11 However, in March, 2010, she reported that she had to return \$7,000 "to Elliston for cash flow,"
12 while at the same time reporting "commission from Elliston" of \$20,000. This accounting
13 resulted in net receipts of \$9,057. In April, 2010, she reported a decline in "commission from
14 Elliston" to \$9,000 and added an item under "rent/leases collected" of \$11,000. This resulted in
15 a net increase in cash for such month of \$17,662. CMR suspects that Debtor is stating higher
16 income than is actually being earned for purposes of beefing up her statements in anticipation
17 of prosecuting her Plan and that future "reversals" will be coming.

18 At best, however, Debtor's net receipts as stated by her in her Operating Reports
19 average \$10,579 per month during 2010, but only about \$7,654 per month over the seven
20 months of her bankruptcy proceeding. Given that Debtor's business apparently is one in which
21 deposits are received in the spring for summer engagements and where winter engagements are
22 slow or nonexistent, it is appropriate to look at her year around earning ability. CMR would
23 further note that Debtor's net receipts as set forth in her Operating Reports have been calculated
24 without any meaningful deductions for Debtor's actual living expenses, the actual operating
25 expenses for the Property, or property taxes and insurance relating to the Property. The return
26 of \$7,000.00 to Elliston, for its "cash flow" during March, 2010, would further suggest that it is
27 more likely that Debtor will actually receive "net" commissions and rents after April, 2010, of
28 less than the reported amounts.

1 CMR disputes that the 5% proposed by Debtor is a fair rate of return on her proposal to
2 extend its loan by an additional 60 months (which would, in effect, turn this 2 year bridge loan
3 into an 8 year loan). However, even if that were a fair rate of return, it is clear that Debtor's
4 proposal in her Plan to make payments to creditors totaling \$15,393.00 per month (\$12,500 to
5 CMR, \$2,558.33 to Golden Valley Mortgage, and \$334.67 to unsecured creditors (10%)), plus
6 actual operating expenses of the Property, property taxes and insurance, and her own living
7 expenses, is purely visionary. Debtor cannot meet her burden of showing "concrete evidence"
8 of a sufficient cash flow to meet such obligations. Thus, her Plan is not feasible and cannot be
9 confirmed.

10 **B. The Plan is Not "Fair and Equitable" with Respect to CMR [11 U.S.C.**
11 **Section 1129(b).**

12 The Plan is not "Fair and Equitable" with regard to Secured Creditor (11 U.S.C. Section
13 1129(b)(2)(A)(i)). CMR denies that the proposed 5% interest rate constitutes the appropriate
14 time value of its money in light of the risks involved (particular, the admitted risk that CMR's
15 loan is presently under-secured and the lack of any evidence that property values have started to
16 appreciate or will appreciate during the next five years). The contract rate of interest is 12%
17 and the default rate of interest is 18%. Required monthly payments by the Debtor, should the
18 contract rate of interest be determined to be the appropriate rate of interest for the risks
19 involved, would be approximately \$32,916.04 per month to CMR alone, more than 1.5 times
20 the Debtor's best and highest estimate of the "gross income" of the Property.

21 In order for a plan to be "fair and equitable" under 11 U.S.C. Section 1129(b)(1), "total
22 deferred payments [to a secured creditor] must have a 'present value' equal to the amount of the
23 allowed secured claim." (In re Bryson Properties, XVIII, 961 Fed.2d 496, 500 (4th Cir. 1992).
24 "Present value" includes the "time value of money" and involves a determination of the
25 appropriate discount rate "in light of the risks involved" (*id.*, at p. 500, fn. 4). As discussed
26 above, Debtor's Plan proposes that CMR receive deferred payment of the entire principal
27 balance of the Note, with a 5% interest rate over 5 years, 7 points lower than the non-default
28 rate agreed to by the parties under the Note for a 2 year period. Because the Plan proposes a

1 below market interest rate for a deferred stream of payments, it fails to provide CMR with the
2 “indubitable equivalent” of its secured claim (11 U.S.C. 1129(b)(2)(A)(iii); 7 Collier on
3 Bankruptcy, Section 1129.05[2][c]). Such failure to provide CMR with the “indubitable
4 equivalent” of its secured claim is exacerbated by the Plan’s proposal to deprive CMR of its
5 Cash Collateral (provided for under the terms and conditions of its Note and Deed of Trust) and
6 to divert such Cash Collateral to Debtor’s own living expenses, operating expenses and to
7 claims of other under-secured and unsecured creditors.

8 In the present case, the Debtor has no equity in the Property, as shown by the
9 approximate agreed market value of \$2,500,000.00 compared to the approximate \$4,060,604.43
10 total of the liens against the property. Given the lack of equity, CMR is entitled to relief from
11 the automatic stay unless the Debtor shows that the property is necessary to an effective
12 reorganization. The Property, having no value and having an insufficient income stream to
13 make payments to CMR alone, much less to Debtor or to any other creditor, cannot add
14 anything positive to a feasible reorganization or liquidation. Therefore, such property is not
15 necessary to an “effective reorganization” (Bankruptcy Code Section 362(d)(2)(B)). Therefore,
16 CMR’s requested relief from stay should be granted and confirmation of the Plan should be
17 denied.

18 Dated: June 6, 2010

19 LAW OFFICES OF
20 JEFFERY D. TROWBRIDGE

21 By: /s/ Jeffery D. Trowbridge
22 JEFFERY D. TROWBRIDGE,
23 Attorney for Secured Creditor,
24 CMR COMMERCIAL MORTGAGE
25 FUND, LLC
26
27
28